2. Article 68 of Regulation (EC) No 883/2004 must be interpreted as meaning that the amount of the differential supplement to be granted to a worker under the legislation of a Member State having secondary competence in accordance with that article must be calculated by reference to the income actually earned by that worker in his Member State of employment.

ECJ 18 September 2019, case C-366/18 (Ortiz Mesonero), Maternity and parental leave

José Manuel Ortiz Mesonero – v – UTE Luz Madrid Centro, Spanish case

Legal background

Directive 2010/18 contains the revised Framework Agreement on parental leave. It lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice.

Clause 6(1) of the Framework Agreement stipulates: "*In order to promote better reconciliation, Member States and/or social partners shall take the necessary measures to ensure that workers, when returning from parental leave, may request changes to their working hours and/or patterns for a set period of time. Employers shall consider and respond to such requests, taking into account both employers' and workers' needs. The modalities of this paragraph shall be determined in accordance with national law, collective agreements and/or practice.*"

The Spanish Workers' Statute contains the following two relevant Articles in respect of parental leave and working hours. Article 34(8) provides: "*Workers shall have the right to adapt their hours of work and work schedule in order to make effective their right to reconcile personal, family and work life, in the terms established in the collective negotiation or in the agreement reached with the employer complying, in any event, with the terms of that negotiation. […]*"

Article 37(6) provides: "*Any person who, for reasons of legal custody, takes direct care of a child under the age of 12 years or of a person with a disability who does not carry out a gainful activity shall be entitled to a reduction in his or her hours of work, with a proportionate reduction in salary, of a minimum of one eighth and a maximum of one half of the duration of those hours. The same right is granted to anyone who has to care directly for a family member up to the second degree or by marriage who, because of age, accident or illness, cannot care for himself or herself and does not engage in a remunerated activity. […]*"

Facts

Mr Ortiz Mesonero was hired by UTE Luz Madrid Centro. His employment contract was subject to the Madrid Metallurgical Industry Collective Agreement. UTE Luz used a shift work system with three shifts of eight hours: a morning, an afternoon and a night shift. Mr Ortiz Mesonero rotated between these shifts with a rest period of two days a week, according to his employer's schedule.

In March 2018, Mr Ortiz Mesonero requested UTE Luz to exclusively work in the morning team, from Monday to Friday, for the same amount of hours against the same pay, so that he could take care of his children. UTE Luz rejected this request.

Mr Ortiz Mesonero then brought proceedings. The Court in first instance dismissed his claims. The Court of Appeal decided to refer a preliminary question to the ECJ. It noted that the Industry Collective Agreement had not implemented Article 34(8) of the Workers' Statute and decided that Mr OrtizMesonero's request was in fact based on Article 37(6). While the latter Article provides the right of reduction of working hours and a corresponding pay, it might also be possible to adapt the working time.

Question

Must Directive 2010/18 and Articles 23 and 33(2) of the Charter of Fundamental Rights be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a worker's right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work?

Considerations

The Framework Agreement lays down minimum requirements. Its only provision relating to the adjustment of working time is Clause 6(1), which applies when 'returning from parental leave'.

In the present case, Mr Ortiz Mesonero wished to change his variable hours shift work into a fixed schedule. It is not apparent that he returned from parental leave. In this situation, neither Directive 2010/18 nor the Framework Agreement contains a provision which would require Member States, in the context of a

doi: 10.5553/EELC/187791072019004004015

request for parental leave, to grant the right to work at a fixed working time when his usual pattern is shift work with variable hours.
As regards Articles 23 and 33(2) of the Charter, Article 51(1) of the Charter stipulates that they are addressed to Member States only when they are implementing Union law. They do not apply beyond the powers of the Union.
Where a legal situation does not come within scope of EU law, the ECJ has no jurisdiction (*Åkerberg Fransson,* C-617/10, EU:C:2013:105, para. 22). Neither Directive 2010/18 nor any other provision referred to in the preliminary question is applicable in the main proceedings. Therefore, it does not appear that that dispute concerns national legislation implementing Union law within the meaning of Article 51(1) of the Charter, so there is no need to interpret Articles 23 and 33(2) of the Charter.

Ruling

Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC must be interpreted as not applying to national legislation, such as that at issue in the main proceedings, which provides for a worker's right, in order to take direct care of minors or dependent family members, to reduce his ordinary hours of work, with a proportional reduction in his salary, without being able, when his usual work system is in shifts with a variable schedule, to benefit from a fixed working schedule while maintaining his ordinary hours of work.

Note

A considerable part of the judgment discussed whether parts of the question referred were admissible. This concerned Directive 2006/54 (equal treatment of men and women in matters of employment and occupation) and various Articles of the TFEU and TEU. However, the ECJ declared these parts inadmissible for various reasons (para. 26-43).

ECJ 19 September 2019, joined cases C-95/18 and C-96/18 (Van den Berg en Giesen), Social insurance

Sociale Verzekeringsbank – v – F. van den Berg (C-95/18), H. D. Giesen (C-95/18), C. E. Franzen (C-96/18), Dutch case

Questions

1. Must Articles 45 and 48 TFEU be interpreted as precluding a law of a Member State under which a migrant worker residing in that Member State, who is subject to the social security legislation of the Member State of employment under Article 13 of Regulation No 1408/71, is not insured for the purposes of the social security scheme of that Member State of residence, despite the fact that the legislation of the Member State of employment does not confer on that worker any entitlement to an old-age pension or child benefit.
2. Must Article 13 of Regulation No 1408/71 be interpreted as precluding a Member State in whose territory a migrant worker resides and which is not competent under that article, from making an entitlement to an old-age pension conditional on that migrant worker having insurance that entails payment of mandatory contributions.

Ruling

1. Articles 45 and 48 TFEU must be interpreted as not precluding a law of a Member State under which a migrant worker residing in the territory of that Member State, who is subject to the social security legislation of the Member State of employment under Article 13 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, in its version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, is not insured for the purposes of the social security scheme of that Member State of residence, despite the fact that the legislation of the Member State of employment does not confer on that worker any entitlement to an old-age pension or child benefit.
2. Article 13 of Regulation No 1408/71, in its version amended and updated by Regulation No 118/97, as

doi: 10.5553/EELC/187791072019004004015